INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Argument	6
Conclusion	10

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U.S. 401	6, 7
Anthony v. *National Labor Relations Board*, 204 F. 2d 832	7
Bandlow & Sorenson v. *Rothman*, 278 F. 2d 866, certiorari denied, 364 U.S. 909	8
General Drivers, Chauffeurs and Helpers, Local 886 v. *National Labor Relations Board*, 179 F. 2d 492	7
Haleston Drug Stores v. *National Labor Relations Board*, 187 F. 2d 418, certiorari denied, 342 U.S. 815	8
Hourihan v. *National Labor Relations Board*, 201 F. 2d 187, certiorari denied, 345 U.S. 930	8
Insurance Workers International Union v. *National Labor Relations Board*, No. 13,088 C.A. 3), January 19, 1960, certiorari denied, 363 U.S. 806	7
Lincourt v. *National Labor Relations Board*, 170 F. 2d 306	7
Manhattan Construction Co. v. *National Labor Relations Board*, 198 F. 2d 320	7
National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U.S. 9	7
National Labor Relations Board v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477	9

Cases—Continued	Page
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	7
National Labor Relations Board v. *Truck Drivers Local Union No. 449*, 353 U.S. 87	9
G. A. Rafel & Co. v. *National Labor Relations Board*, No. 13,166 (C.A. 7), January 9, 1961, certiorari denied, 366 U.S. 948	7
Retail Store Employees Union, Local 954 v. *Rothman*, No. 16,534 (C.A.D.C.), January 11, 1962, 49 LRRM 2391	8
Statute:	
National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*:	
Sec. 3(d)	2, 7
Sec. 8(b)(3)	4, 9
Sec. 10(a)	6
Sec. 10(b)	2, 6, 7
Sec. 10(c)	3, 6
Sec. 10(e)	3, 6
Sec. 10(f)	4, 6
Miscellaneous:	
93 Cong. Rec. 6859, 2 Legis. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 1622-1623	8

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 680

THE CONTRACTORS ASSOCIATION OF PHILADELPHIA ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a; R. 11a-12a)[1] is reported at 295 F. 2d 526. No proceedings were held before the Board, and the

[1] The record in the court below consisted of a petition to review with supporting exhibits and the Board's motion to dismiss with supporting exhibits. These documents are reprinted in part in the "Record" (hereafter designated "R.") filed by petitioner in this Court.

informal proceedings before the General Counsel of the Board are unreported.

JURISDICTION

The decision and order of the court of appeals were entered on October 31, 1961 (Pet. App. 4a, 5a; R. 42a). The petition for a writ of certiorari was filed on January 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly concluded that it lacked jurisdiction to review and set aside the determination of the General Counsel of the National Labor Relations Board not to issue an unfair labor practice complaint on the charges filed by petitioner.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, are as follows:

> Sec. 3. (d) * * * The General Counsel of the Board * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *.
>
> * * * *
>
> Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for

such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary

relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

STATEMENT

On May 23, 1961, petitioners filed unfair labor practice charges with the Regional Director of the Board alleging that the Unions[2] had refused to bargain in good faith, in violation of Section 8(b)(3) of the National Labor Relations Act, by engaging

[2] Local Unions 542, 542-A and 542-B, Operating Engineers, AFL-CIO.

in a strike to enforce certain demands made during collective bargaining negotiations (Pet. 7-9; R. 8a-9a). The facts showed that, upon expiration of their most recent collective bargaining contract on April 30, 1961, petitioners (three multi-employer bargaining associations) and the Unions commenced negotiations toward a new contract (Pet. 7-8). When the parties were unable to reach agreement, the Unions, on May 3, 1961, went on strike against certain employer-members of petitioners' association to exert economic pressure in furtherance of their bargaining demands (Pet. 8-9). There was no evidence that the strike was other than peaceful, or that the Unions' bargaining demands were unlawful. The Regional Director, after investigation of the charges, advised petitioners that there was "insufficient evidence of violation," and declined to issue a complaint thereon (Pet. 10; R. 25a-26a). This action was appealed to the General Counsel of the Board, who sustained the Regional Director. The General Counsel advised petitioners "that there is insufficient evidence of violations to warrant further proceedings" (Pet. App 1a; Pet. 10; R. 36a-38a).

Petitioners thereupon filed a petition in the United States Court of Appeals for the Third Circuit, requesting that court to review the General Counsel's refusal to issue a complaint (Pet. 10; R. 1a-7a). The court of appeals, in a *per curiam* opinion, dismissed the petition for lack of jurisdiction.

ARGUMENT

The decision below is correct, and no conflict of decisions exists. No issue warranting review by this Court is presented.

1. (*a*) Section 10(a) of the Act authorizes the Board to prevent any person from engaging in unfair labor practices; Section 10(b) provides for the issuance of a complaint and the holding of a hearing; Section 10(c) empowers the Board to "issue * * * an order" directing any person named in the complaint to cease and desist from the commission of unfair labor practices, or to "issue an order" dismissing the complaint; Section 10(e) confers jurisdiction on the courts of appeals in the event that the Board petitions to enforce "such order"; and Section 10(f) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the appropriate court of appeals. The decision of the General Counsel not to issue an unfair labor practice complaint is clearly not a "final order of the Board" within the meaning of Section 10(f). As this Court held in *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 406-410, the "entire structure of the Act emphasizes" that the term "final order," as used in Section 10(f), refers solely to an order of the Board rendered at the culmination of the unfair labor practice proceedings described in Section 10(b) and (c) of the Act. Accordingly, suits instituted in the courts of appeals to obtain review of the General Counsel's decision not to issue an un-

fair labor practice complaint have consistently been dismissed for lack of jurisdiction over the subject matter. *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (C.A. 1); *General Drivers, Chauffeurs, and Helpers, Local 886* v. *National Labor Relations Board*, 179 F. 2d 492, 494-495 (C.A. 10); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F. 2d 320, 321-322 (C.A. 10); *Anthony* v. *National Labor Relations Board*, 204 F. 2d 832, 833 (C.A. 6); *Insurance Workers International Union* v. *National Labor Relations Board*, No. 13,088 (C.A. 3), January 19, 1960, certiorari denied, 363 U.S. 806. See, also, *G. A. Rafel & Co.* v. *National Labor Relations Board*, No. 13,166 (C.A. 7), January 9, 1961, certiorari denied, 366 U.S. 948.[3]

(*b*) Furthermore, Section 10(b) of the Act vests the Board or its agent with broad discretionary power with respect to the issuance of unfair labor practice complaints. See *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. Section 3(d) confers this power upon the General

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[3] Petitioners' contention that it has a constitutional right to judicial review of the General Counsel's refusal to issue a complaint is without merit. The procedural provisions of the Act, including those sections which limit judicial review to a final order of the Board, "do not offend against the constitutional requirements governing the creation and action of administrative bodies." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47. "The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force." *American Federation of Labor* v. *National Labor Relations Board*, *supra*, 308 U.S. at 412.

Counsel of the Board, and provides that he shall have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *." The Act makes no provision for review of the General Counsel's threshold determination of whether an unfair labor practice proceeding should be initiated, and the Congressional intent to preclude judicial review of such a decision is not only clear from the language of the statute, but also from the characterization by Congress of the General Counsel's role as analogous to that of a district attorney in deciding whether to initiate a prosecution.[4] Accordingly, suits instituted in the district courts to review the General Counsel's refusal to issue a complaint have uniformly failed. See *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (C.A.D.C.), certiorari denied, 345 U.S. 930; *Bandlow & Sorenson* v. *Rothman*, 278 F. 2d 866 (C.A.D.C.), certiorari denied, 364 U.S. 909; *Retail Store Employees Union, Local 954* v. *Rothman*, No. 16,534 (C.A.D.C.), January 11, 1962, 49 LRRM 2394. See, also, *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 422 (C.A. 9), certiorari denied, 342 U.S. 815.

2. Although it is irrelevant in view of the lack of jurisdiction in the court of appeals to review the General Counsel's refusal to issue a complaint, we may also point out that petitioners clearly fail to make out any case of an abuse of discretion or of

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[4] See Senator Taft's statement at 93 Cong. Rec. 6859, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 1622-1623.

a patent misapplication of statutory terms by the General Counsel. Petitioners alleged (R. 8a-9a) that the Unions' strike against certain employer-members of petitioners' multi-employer bargaining associations constituted *per se* a refusal to bargain in good faith, in violation of Section 8(b)(3) of the Act.[5] There is no evidence, however, that the Unions' strike was anything but a peaceful strike designed to exert economic pressure on the multi-employer association in support of lawful demands made by the Unions during current collective bargaining negotiations. The General Counsel's determination, that the strike did not constitute a *per se* violation of Section 8(b)(3), is clearly in accord with settled principles. See, *e.g.*, *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477; cf. *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87.[6]

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[5] Petitioners' suggestion (Pet. 5) that Section 8(b)(4) of the Act—the "secondary boycott" section—is involved here is misleading. No secondary boycott is involved; nor was such conduct alleged by petitioners' unfair labor practice charge.

[6] The informal administrative files of the General Counsel indicate that the present case is for all practical purposes moot because the parties reached agreement on a new collective bargaining contract several days before the Regional Director dismissed petitioners' charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LEE M. MODJESKA,
Attorney,

National Labor Relations Board.

FEBRUARY 1962.

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